In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 726

ANTHONY MARDEROSIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 31-34) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1964. The petition for a writ of certiorari was filed on November 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the affidavit for a search warrant was sufficient to show probable cause.

2. Whether the warrant could properly authorize the seizure of gambling paraphernalia as an instrumentality of the crime of carrying on the business of accepting wagers without having paid the federal tax.

3. Whether petitioner was entitled to the name of the confidential informant referred to in the affidavit for the warrant where there was no showing that the name of the informant had any bearing on petitioner's defense.

4. Whether the evidence supports the verdict.

5. Whether the trial judge coerced a verdict.

STATEMENT

Petitioner was convicted in the District Court for the District of Rhode Island on two counts charging failure to pay the special occupational tax before engaging in the business of wagering, in violation of 26 U.S.C. 7203 and 7262. He was sentenced on the first count to imprisonment for two months and a fine of $1500 and on the second count to probation for a year (R. 196-197). The court of appeals affirmed (Pet. App. 31-34).

The government's evidence showed that petitioner rented an apartment in North Providence under the name of Maccarone (R. 46). He told the landlady that he was separated from his wife and worked nights and slept during the day (R. 53). A telephone

was installed in the apartment under the name of Maccarone (R. 124-125). On May 8, 1962, officers, acting under a search warrant, entered petitioner's apartment after he failed to respond to their knock and announcement of purpose (R. 58, 71, 143). When petitioner saw them he said, "You got me now" (R. 58, 114). There were two telephones in the apartment (R. 59, 73-74). While the officers were there, the telephone rang a number of times and was answered by one of the officers (R. 112). Most of the callers hung up after the telephone was answered, but one caller said he wanted a bet on certain races (R. 113-114). Pursuant to the warrant the officers seized two Armstrong racing forms and a number of sheets of paper with names and figures (R. 58-59, 60-70). Officers familiar with the manner of operation of the wagering business testified that some of the notations reflected that bets on horses were being received and recorded (R. 94-98, 149). Another sheet represented information for odds on baseball games (R. 98-99, 153) and still another a record of a numbers pool (R. 99-100, 153-154). Petitioner had no tax stamp (R. 58, 79, 136, 145).

ARGUMENT

1. The affidavit on which the search warrant was issued appears at pages 6-11 of the record and its salient facts are summarized in the opinion below (Pet. App. 31-32). The information given by an informant previously found to be reliable was confirmed in important respects during a period of sur-

veillance from March 28 to May 3, the latter date only five days prior to the time the warrant was obtained. The affidavit was clearly sufficient under the standards laid down by this Court in *Jones* v. *United States*, 362 U.S. 257.[1]

2. The warrant properly authorized a search for gambling paraphernalia (see Pet. 8-10). As the court of appeals pointed out, the crime charged to petitioner was "completed not when the tax was not paid, but when, the tax not having been paid, the business was carried on" (Pet. App. 33). Hence the means of carrying on the business of wagering were instrumentalities of the federal crime, subject to seizure under a warrant. *United States* v. *$1,058.00 in United States Currency*, 323 F. 2d 211 (C.A. 3); see *Marron* v. *United States*, 275 U.S. 192.

3. There is no color of a claim that the name of the informant referred to in the search warrant was necessary to petitioner's defense. His argument (Pet. 15-17) that he was entitled to the name to challenge the affidavit is foreclosed by *Rugendorf* v. *United States*, 376 U.S. 528.

4. Petitioner's challenge to the sufficiency of the evidence (Pet. 25-28) is answered by the facts summarized in the Statement. In view of the fact that petitioner rented the raided apartment and had a telephone installed under the name he assumed, the jury had a right to infer, as its verdict reflects, that pe-

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[1] The government has never contended that the decision of the Commissioner as to the sufficiency of the affidavit was not reviewable (see Pet. 6-7).

titioner was receiving wagers on his own and not for another. This conclusion is supported by petitioner's statement to the officers on the day of the raid (*supra*, p. 3).

5. The jury retired to deliberate at 12:10 p.m. (R. 185). At about 5:50 p.m., when one of the jurors asked to make a telephone call, the court on its own initiative thought it might be helpful to make a few suggestions (R. 185, 186). The court said (R. 185-186):

> In your deliberations, Mr. Foreman and ladies and gentlemen, it is your duty, each of you, to consider your decisions in these cases with candor and with due deference to the opinions of each other. You must realize that the trial of these cases is expensive both to the Government and to the defendant. You further should realize that these cases must be decided, and there is no reason to believe that it will ever be possible to submit them to twelve jurors more impartial, more capable of deciding them, than you are.
>
> While it is true that the verdict of a jury should represent the individual view of each juror, it by no means follows that the opinions of a juror may not be changed by conferences in the jury room. The very object of our jury system is to secure unanimity of opinion after frank and honest, intelligent, comparison of the views of the individual jurors. It is not intended that any one of you should have gone into the jury room with a fixed determination at that moment. Nor is it intended that any member of the jury should close his or her ears to the arguments of other jurors who are equally as intelligent and as honest as he or she may be.

Arrangements were then made for dinner for the jury (R. 186). After more than four hours of further deliberation, at 11:40 p.m., the jury reported that it was unable to reach a verdict (R. 187). The court inquired whether there was any doubt about the instructions and the foreman replied, "we have nothing particular" (R. 187). The court then said (R. 187-188):

> I dislike, Mr. Foreman, ladies and gentlemen, to keep you at this task any longer, but, as I said to you earlier in the evening, this case must be decided and I have no reason to believe that it will ever be possible to select twelve jurors more capable of deciding it than you are.
>
> Do you feel, Mr. Foreman, ladies and gentlemen, that if you were to resume your deliberations in your own way, and reconsider and re-examine the evidence that has been presented here, that you may be able to reach a verdict? This Court is disposed to give you ample time to consider and re-examine the evidence and the exhibits. If there is any part of the testimony that you would like to have read back to you, I will be happy to ask the court reporter to do that, if it would be of any assistance to you. If there is any part of my charge or any part of the evidence that you desire to have read back, we would be very glad to have that done.

When the foreman said a little doubt had arisen as to the terms "accept" and "receive", the court elucidated these terms (R. 188) and said (R. 189):

> Have I made myself clear? If I have, Mr. Foreman, and you think further deliberations

> might be of assistance, I am going to ask you to go back to your jury room and proceed with your deliberations. If there are any other further instructions that you would like and any testimony read, I would be happy to have that done.

The foreman asked for a charge on circumstantial evidence. When the court said, "You do not have in mind any question about my instructions as to reasonable doubt", the foreman replied, "That would enter into it too" (R. 189). The court then instructed on these matters (R. 189-191). The jury retired again at 11:55 p.m. and returned with its verdict at 1:20 a.m. (R. 191-192).

This record makes it clear that the judge did not coerce or insist that the jury agree upon a verdict, either in its initial remarks at 5:50 p.m. or in its colloquy at 11:40 p.m.[2] It is significant that the jury took considerable time for further deliberations after each of the supplemental remarks. It was, of course, proper, when the jury reported disagreement, for the judge to explore the possibility that there were misunderstandings of the law and to clear up the points which appeared to be troubling the jury. See *Estes* v. *United States*, 335 F. 2d 609, 618-619 (C.A. 5), petition for a writ of certiorari pending, No. 601, this Term, and cases there cited.

2/ The remarks of the judge in this case are so different in character from those involved in Jenkins v. United States, No. 107 Misc., this Term, certiorari granted on December 14, 1964, that we do not believe that it is necessary to delay action on this petition pending determination of that case.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1964.